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No. 92-1784

IN THE

# Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,

*Petitioner,*

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc., in accordance with Sup. Ct. R. 15.7, respectfully inform this Court of the First Circuit Court of Appeals' recent decision in *King v. E.I. Du Pont de Nemours and Co.*, 1993 WL 232939 (1st Cir. July 7, 1993) [hereinafter *"King"*]. The *King* decision is supplemental authority which supports Respondents' position as presented in their Brief in Opposition, submitted to this Court on June 30, 1993, in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 981 F.2d 1177 (10th Cir. 1993) [hereinafter *"Arkansas-Platte II"*], *petition for cert. filed,* 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784).

In *King*, the First Circuit held that, in light of this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 and Supp. IV 1992), pre-empts state law tort claims which are based upon alleged failure to warn theories:

> *Cipollone* held that the words in the 1969 cigarette statute " '[n]o requirement or prohibition'...easily encompass[ed] obligations that take the form of common law rules." *Cipollone,* 112 S. Ct. at 2620. The FIFRA language prohibiting the states from "impos[ing] or continu[ing] in effect any requirements," 7 U.S.C. § 136v(b), is virtually indistinguishable from the state-imposed "requirement" language that *Cipollone* held preempted the state common law tort claims based on inadequate warning. FIFRA's language, too, preempts the state law lack-of-warning claims involved in this case.

1993 WL 232939, **3-4. The First Circuit also rejected *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.) *cert. denied*, 469 U.S. 1062 (1984), as unpersuasive in light of *Cipollone* and the three other post-*Cipollone* Courts of Appeals FIFRA decisions:

> In deciding *Ferebee*, the District of Columbia Circuit did not have the benefit of the Supreme Court's subsequent analysis and ruling in *Cipollone*. It is impossible to predict whether, in light of *Cipollone* and the [three] other courts of appeals' decisions discussed above [i.e. *Arkansas-Platte II, Papas II,* and *Shaw v. Dow Brands, Inc.*], the District of Columbia Circuit would continue to follow *Ferebee*. In any event, for the reasons set forth in this opinion, we do not find *Ferebee* persuasive.

1993 WL 232939, *5.

The *King* decision demonstrates that, contrary to Petitioner's assertions, there is no conflict between the United States Courts

of Appeals or state courts of last resort on the pre-emptive scope of FIFRA; all such courts which have addressed the FIFRA pre-emption issue after this Court's decisions in *Cipollone* and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), have unanimously held that FIFRA pre-empts state law failure to warn claims. The First Circuit thus joins the Tenth Circuit Court of Appeals in *Arkansas-Platte II*; the Eleventh Circuit Court of Appeals in *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) [hereinafter "*Papas* II"], *petition for cert. filed sub nom. Papas v. Zoecon Corp.*, 61 U.S.L.W. 3836 (U.S. June 7, 1993) (No. 92-1938); the Seventh Circuit Court of Appeals in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); and the Supreme Court of Nevada in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (April 26, 1993), which have all held that FIFRA pre-empts state law failure to warn claims.

Respondents request that this Court deny the petition for writ of certiorari.

Respectively submitted,

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